MAR 19 1981
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No. 80-1216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CORTES W. RANDELL, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY MEMORANDUM FOR PETITIONER

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1. The government apparently cannot answer our arguments except by misstating the facts of the case. The government's careless treatment of the facts cannot, however, obscure a record that squarely poses the important constitutional question presented in our Petition.

In a footnote, the government asserts that although our Petition raises a Fifth Amendment objection to the portion of the indictment alleging concealment from the grand jury and the SEC, our objection in the district court was aimed only at the grand jury. Brief in Opposition, at p. 7 n.6. The government should have examined the record. Our pretrial motion argued in no uncertain terms that both aspects of the concealment charges — those concerning the grand jury and the SEC — violated the privilege against self-incrimination and did so for the same reasons.[1] The prosecutors at trial had no difficulty understanding the nature of our objection, which they characterized as an assertion that the grand jury had indicted Randell "for his failure to testify before the Grand Jury, the SEC and other governmental bodies."[2] The issue regarding concealment from the SEC was thus clearly presented to the district court (and to the court of appeals), which is why the government's "waiver" contention was never before raised. There is, as the Solicitor General suggests, an argument made for the first time in this Court, but it is not petitioner's.

The government's other point is based on its misapprehension that there was evidence at trial showing an attempt by Randell to persuade others not to appear before the SEC. Brief in Opposition, at p. 8. In support of its view of the evidence, however, the government

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[1] See Memorandum of Points and Authorities in Support of Defendant Cortes W. Randell's Motion to Dismiss Indictment, at p. 4, n. 6, filed Nov. 2, 1978 (Pretrial Motions of Defendant Cortes W. Randell, at p. 5).

[2] *See Government's Consolidated Memorandum of Law in Opposition to Defendants' Pretrial Motions,* at p. 11.

cites not to the record at trial but to the grand jury transcript. *Id.* at p. 8 n.7 (first sentence). What the government ignores is that no evidence of this sort was presented to the jury at trial.

Moreover, even the evidence heard only by the grand jury could not have led to the conclusion that Randell concealed his offense from the SEC by influencing others. The government says (*ibid.*): "It was when he called Barbara Fisher to inquire about her pending meeting with an SEC attorney[3] that petitioner attempted to induce her to be wary of possible indictment by the United States Attorney on 'some sort of technicality'." But evidence of this call (which was not presented at trial) had nothing whatever to do with the SEC. The Solicitor General neglects to point out that this meeting occurred only a few days before the indictment was returned in this case, long after the SEC's involvement in the case had ended, and that the "SEC attorney" was working for the United States Attorney's Office, assisting the prosecutors in preparing the case.[4] The following statement in our Petition (at p. 10) is thus entirely accurate: "There was simply no evidence at trial that petitioner took affirmative steps to conceal his crime from the SEC."

2. The government appears to agree that if the charges of concealment were based merely upon petitioner's failure to report his own crime, the Fourth Circuit's decision affirming his conviction is in conflict

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[3] Actually, it was Fisher who called Randell.

[4] The government admitted this in the district court. *See Government's Consolidated Memorandum of Law in Opposition to Defendants' Pretrial Motions*, at p. 66 (arguing that "involvement of an SEC attorney in a criminal investigation after the SEC case is over" is not improper).

with the other circuits. Brief in Opposition at p. 8. The government's only ground for avoiding the consequence of the conflict is its assertion that petitioner's case involved affirmative acts beyond a mere failure to disclose his offense. As we have discussed, the government's assertion is based on a misunderstanding of the record.

With respect to the issue presented here — whether under the Fifth Amendment, petitioner may be indicted and convicted for failing to disclose his own crime to the government — the government has offered nothing that would support the decision of the court below and the cases we have cited are plainly against the government's position. The case relied upon by the government, *United States* v. *Daddano,* 432 F.2d 1119, 1125 (7th Cir. 1970), *cert denied,* 402 U.S. 905 (1971), has been distinguished and severely limited by two subsequent decisions (*United States* v. *Jennings,* 603 F.2d 650, 653 n.6 (7th Cir. 1979) and *United States* v. *Kuh,* 541 F.2d 672, 676 (7th Cir. 1970)), both of which we cited in our Petition, at p. 8. Under the 7th Circuit's current view of the Fifth Amendment, there can be no doubt that petitioner's conviction would have been reversed for the reasons we discussed in our Petition, at pp. 7-11.[5]

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[5] The only other case cited by the government, *United States* v. *Apfelbaum*, 445 U.S. 115 (1980), does not address the issue presented here. If *Apfelbaum* makes any contribution to resolution of this case, it is through its re-emphasis of the crucial importance of the constitutional issues raised. See especially the Court's reliance upon *Marchetti* v. *United States*, 390 U.S. 39 (1968) (unconstitutionality of statutes requiring gamblers to report their activities to the government).

This Court, we submit, should resolve the conflict in the circuits that has resulted from the Fourth Circuit's erroneous decision in this case.[6]

3. We have argued that the inclusion of allegations of concealment within the mail fraud counts violated the principles of *Grunewald* v. *United States,* 353 U.S. 391 (1957). The government's own statement of the case reveals that the last act in furtherance of the scheme to defraud occurred at the end of 1974. The SEC investigation began in 1976 and the grand jury did not convene until 1978. Brief in Opposition at pp. 1-5. Under the rule of *Grunewald,* the allegations of concealment were not properly a part of the fraud and should not have been included in the same counts of the indictment. With these improper allegations in the indictment, the jury may have convicted petitioner on an impermissible basis. Such a verdict may not stand. *Sandstrom* v. *Montana,* 442 U.S. 510 (1979).

The government argues that the concealment was properly charged, as "an ongoing component of the scheme," which permitted petitioner to use the funds he unlawfully acquired. Brief in Opposition at p. 9. Such an approach eviscerates *Grunewald.* In every conspiracy, maintenance of secrecy is necessary to the participants' enjoyment of the fruits of their crime. The exception the government seeks to invoke here would be applicable in every case. In effect, the government's position would render *Grunewald* a nullity.

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[6] This Court has recently emphasized the importance of the issue presented here by reaffirming the constitutional prohibition against penalyzing a man for failing to assist the government in his own prosecution. *See Carter* v. *Kentucky* _____ U.S. _____ (No. 80-5060, decided March 9, 1981) (28 CrL 3093) (requiring instruction to jury on defendant's right not to testify).

CONCLUSION

For the foregoing reasons and the reasons submitted in our Petition, the writ of certiorari should be granted.

Respectfully submitted,

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